

# **UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO**

## **SUMMARY OF AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE**

**Effective December 1, 2003**

**(Please refer to the full text of these changes. This is only a summary)**

### **Rule 23. Class Actions**

The requirement that the court determine whether to certify a class “as soon as practicable after commencement of an action” is replaced by requiring determination “at an early practicable time.” The notice provisions must clearly state in plain language the following: the nature of the action; the definition of the class certified; the class claims, issues, or defenses; and that a class member may enter an appearance through counsel if the member so desires.

Subdivision (c)(1)(C), reflects two amendments. The provision that a class certification “may be conditional” is deleted. A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met. The provision that permits alteration or amendment of an order granting or denying class certification, is amended to set the cut-off point at final judgment rather than “the decision on the merits.”

Paragraph (2). The first change made in Rule 23(c)(2) is to call attention to the court’s authority — already established in part by Rule 23(d)(2) — to direct notice of certification to a Rule 23(b)(1) and (b)(2) class.

Subdivision (e) is amended to strengthen the process of reviewing proposed class-action settlements.

Paragraph (1). Subdivision (e)(1)(A) expressly recognizes the power of a class representative to settle class claims, issues, or defenses.

Rule 23(e)(1)(A) resolves the ambiguity in former Rule 23(e)’s reference to dismissal or compromise of “a class action.”

Subdivision (e)(1)(B) carries forward the notice requirement of present Rule 23(e), when the settlement binds the class through claim or issue preclusion; notice is not required when the settlement binds only the individual class representatives.

Subdivision (e)(1)(C) confirms and mandates the already common practice of holding hearings as part of the process of approving settlement, voluntary dismissal, or compromise that would bind members of a class.

Subdivision (e)(1)(C) states the standard for approving a proposed settlement that would bind class members. The settlement must be fair, reasonable, and adequate.

Paragraph (2). Subdivision (e)(2) authorizes the court to direct that settlement proponents file copies or summaries of any agreement or understanding made in connection with the settlement agreement or understanding made in connection with the settlement.

Paragraph (2). Subdivision (e)(2) requires parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) to file a statement identifying any agreement made in connection with the settlement.

Paragraph (3). Subdivision (e)(3) authorizes the court to refuse to approve a settlement unless the settlement affords class members a new opportunity to request exclusion from a class certified under Rule 23(b)(3) after settlement terms are known.

Paragraph (4). Subdivision (e)(4) confirms the right of class members to object to a proposed settlement, voluntary dismissal, or compromise. The right is defined in relation to a disposition that, because it would bind the class, requires court approval under subdivision (e)(1)(C).

Subdivision (e)(4)(B) requires court approval for withdrawal of objections made under subdivision (e)(4)(A).

Subdivision (g) is new. It responds to the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action.

Paragraph (1) sets out the basic requirement that class counsel be appointed if a class is certified and articulates the obligation of class counsel to represent the interests of the class, as opposed to the potentially conflicting interests of individual class members. It also sets out the factors the court should consider in assessing proposed class counsel.

Paragraph (1)(A) requires that the court appoint class counsel to represent the class. Paragraph (1)(A) does not apply if “a statute provides otherwise.”

Paragraph 1(B) recognizes that the primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class.

Paragraph (2). This paragraph sets out the procedure that should be followed in appointing class counsel.

Paragraph (2)(A) authorizes the court to designate interim counsel during the pre-certification period if necessary to protect the interests of the putative class. Rule 23(c)(1)(B) directs that the order certifying the class include appointment of class counsel.

Rule 23(c)(1) provides that the court should decide whether to certify the class “at an early practicable time,” and directs that class counsel should be appointed in the order certifying the class.

Paragraph (2)(B) states the basic standard the court should use in deciding whether to certify the class and appoint class counsel in the single applicant situation -- that the applicant be able to provide the representation called for by paragraph (1)(B) in light of the factors identified in paragraph (1)(C).

Paragraph (2)(C) builds on the appointment process by authorizing the court to include provisions regarding attorney fees in the order appointing class counsel.

Subdivision (h) is new. This subdivision provides a framework for fee awards in class actions.

Paragraph (1). Any claim for an award of attorney fees must be sought by motion under Rule 54(d)(2), which invokes the provisions for timing of appeal in Rule 58 and Appellate Rule 4.

Paragraph (2). A class member and any party from whom payment is sought may object to the fee motion. Other parties — for example, nonsettling defendants — may not object because they lack a sufficient interest in the amount the court awards.

Paragraph (3). Whether or not there are formal objections, the court must determine whether a fee award is justified and, if so, set a reasonable fee. The rule does not require a formal hearing in all cases.

Paragraph (4). By incorporating Rule 54(d)(2), this provision gives the court broad authority to obtain assistance in determining the appropriate amount to award.

### **Rule 51. Instructions to Jury; Objections; Preserving a Claim of Error**

Rule 51 is revised to capture many of the interpretations that have emerged in practice. The revisions in text will make uniform the conclusions reached by a majority of decisions on each point.

*Scope.* Rule 51 governs instructions to the trial jury on the law that governs the verdict. A variety of other instructions cannot practicably be brought within Rule 51.

*Requests.* Subdivision (a) governs requests. Apart from the plain error doctrine recognized in subdivision (d)(2), a court is not obliged to instruct the jury on issues raised by the evidence unless a party requests an instruction. The revised rule recognizes the court's authority to direct that requests be submitted before trial.

Subdivision (a)(2)(B) expressly recognizes the court's discretion to act on an untimely request.

*Instructions.* Subdivision (b)(1) requires the court to inform the parties, before instructing the jury and before final jury arguments related to the instruction, of the proposed instructions as well as the proposed action on instruction requests. The time limit is addressed to final jury arguments to reflect the practice that allows interim arguments during trial in complex cases; it may not be feasible to develop final instructions before such interim arguments.

Subdivision (b)(2) complements subdivision (b)(1) by carrying forward the opportunity to object established by present Rule 51. It makes explicit the opportunity to object on the record, ensuring a clear memorial of the objection.

Subdivision (b)(3) reflects common practice by authorizing instructions at any time after trial begins and before the jury is discharged.

*Objections.* Subdivision (c) states the right to object to an instruction or the failure to give an instruction.

*Preserving a claim of error and plain error.* Many cases hold that a proper request for a jury instruction is not alone enough to preserve the right to appeal failure to give the instruction. The request must be renewed by objection.

### **Rule 53. Masters**

Rule 53 is revised extensively to reflect changing practices in using masters.

Subdivision (a)(1). District judges bear primary responsibility for the work of their courts. A master should be appointed only in limited circumstances. Subdivision (a)(1) describes three different standards, relating to appointments by consent of the parties, appointments for trial duties, and appointments for pretrial or post-trial duties.

*Consent Masters.* Subparagraph (a)(1)(A) authorizes appointment of a master with the parties' consent. Party consent does not require that the court make the appointment; the court retains unfettered discretion to refuse appointment.

*Trial Masters.* Use of masters for the core functions of trial has been progressively limited. These limits are reflected in the provisions of subparagraph (a)(1)(B) that restrict appointments to exercise trial functions.

Subparagraph (a)(1)(B)(ii) carries forward the approach of present Rule 53(b), which exempts from the "exceptional condition" requirement "matters of account and of difficult computation of damages."

*Pretrial and Post-Trial Masters.* Subparagraph (a)(1)(C) authorizes appointment of a master to address pretrial or post-trial matters. Appointment is limited to matters that cannot be addressed effectively and in a timely fashion by an available district judge or magistrate judge of the district.

*Magistrate Judges.* There is statutory authority to appoint a magistrate judge as special master. 28 U.S.C. § 636(b)(2).

Post-Trial Masters. Courts have come to rely on masters to assist in framing and enforcing complex decrees. Present Rule 53 does not directly address this practice. Amended Rule 53 authorizes appointment of post-trial masters for these and similar purposes.

Subdivision (a)(2) and (3). Masters are subject to the Code of Conduct for United States Judges, with exceptions spelled out in the Code.

Subdivision (b). Rule 53(b)(2) requires precise designation of the master's duties and authority.

Subdivision (b)(2)(C) provides that the appointment order must state the nature of the materials to be preserved and filed as the record of the master's activities, and (b)(2)(D) requires that the order state the method of filing the record.

Subdivision (b)(3) permits entry of the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455.

The provision in Rule 53(b)(4) for amending the order of appointment is as important as the provisions for the initial order. Anything that could be done in the initial order can be done by amendment.

Subdivision (c) is a simplification of the provisions scattered throughout present Rule 53. It is intended to provide the broad and flexible authority necessary to discharge the master's responsibilities.

The subdivision (d) provisions for evidentiary hearings are reduced from the extensive provisions in current Rule 53.

Subdivision (e) provides that a master's order must be filed and entered on the docket.

Subdivision (f) restates some of the provisions of present Rule 53(e)(1). The report is the master's primary means of communication with the court.

The provisions of subdivision (g)(1), describing the court's powers to afford a hearing, take evidence, and act on a master's order, report, or recommendations are drawn from present Rule 53(e)(2), but are not limited, as present Rule 53(e)(2) is limited, to the report of a trial master in a nonjury action.

Subdivision (g)(3) establishes the standards of review for a master's findings of fact or recommended findings of fact.

Under Rule 53(g)(4), the court must decide de novo all objections to conclusions of law made or recommended by a master.

#### **Rule 54. Judgments; Costs**

Rule 54(d)(2)(D) is revised to reflect amendments to Rule 53.

**Rule 71A. Condemnation of Property**

The references to specific subdivisions of Rule 53 are deleted or revised to reflect amendments of Rule 53.